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No. 00-1438

IN THE

Supreme Court of the United States

JOHNNY REYNOLDS, *et al.*,
Petitioners,

and

CECIL PARKER, *et al.*,
Petitioners,

v.

G.M. ROBERTS, in his official capacity as Director of the Alabama Department of Transportation, *et al.*,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit

MOTION FOR LEAVE TO FILE BRIEF AS *AMICUS CURIAE* AND BRIEF *AMICUS CURIAE* OF THE NATIONAL BAR ASSOCIATION IN SUPPORT OF PETITIONERS

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MOTION FOR LEAVE TO FILE BRIEF AS *AMICUS CURIAE*

The National Bar Association ("NBA") respectfully moves for leave to file this Brief as *amicus curiae* supporting the petition. This motion and brief are filed within the time allowed by Supreme Court Rule 37.2(b); this Court, upon the request of some Respondents, has extended the time for filing briefs in opposition to May 15, 2001 (though Respondents subsequently decided to waive their right to file such briefs). The NBA is the oldest and largest bar association in this country composed primarily of African-American attorneys, judges, legal educators and law students. During its 75-year history, the NBA has participated as *amicus curiae* many times before this Court, as well as other federal courts.

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INTEREST OF THE MOVANT [1]

The interest of The National Bar Association ("NBA") here is as follows.

First, this case arises in a litigation context which has been very close to the heart of the NBA and many of its members over its long history: the administration of federal injunctions and consent decrees, in institutional litigation challenging race discrimination. Many members of the NBA have decades of experience as counsel for plaintiffs in institutional reform litigation, which will allow them to shed light on the issues in a way which should prove helpful to this Court. In more recent years, members of the NBA have also represented governmental entities and other defendants in this sort of litigation; and this experience, we respectfully submit, will allow the NBA's brief to reflect a balanced approach which will prove all the more helpful to the Court. Second and more broadly, regardless of the clients which its attorney members are representing or the causes they are pursuing, a vast number of the NBA's members are frequent and experienced practitioners in federal courts. Thus they, and the NBA, have an important interest in ensuring that the law governing the resolution of disputes in federal courts is clear, uniform, and fair.

On a more case-specific level, the NBA also has an interest in standing up for the learned U.S. District Judge (an NBA member), whom the Eleventh Circuit erroneously criticized and whose actions the Eleventh Circuit incorrectly described.

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[1] This brief was not written in whole or in part by counsel for a party, and no one other than the NBA, its members, and its counsel made a monetary contribution to its preparation or submission.

Consent for the filing of this brief was sought, but was withheld by all Respondents.

SUMMARY OF THE ARGUMENT

Each of the Questions Presented is of considerable importance to the administration of justice in federal courts, going well beyond the immediate context of this case.

The first question, regarding the scope of a District Court's authority when overseeing a consent decree, brings to this Court a crucial issue of federal law. The Eleventh Circuit's rule is now that a District Court overseeing a consent decree can modify that decree in order to make it weaker or abolish it altogether, but (under the decision in this case, apparently) cannot modify a decree even slightly for the purpose of saving it from internal conflict, manipulation, evasion, or obsolescence. Other Circuits reject such a limitation on the modification power. This is a critical question which will recur frequently in some of the most important litigation of our time, and which calls out for uniformity which can only now come from this Court. The NBA submits that the Eleventh Circuit's view is wrong because (among other reasons) it conflicts with relevant decisions from this Court and would deter settlement of major cases.

The second question, regarding the Eleventh Circuit's *sua sponte* call for possible sanctions on plaintiffs' counsel, is of vital importance to all practicing attorneys. There is one aspect of the Eleventh Circuit's decision in this regard which (in the NBA's view) deserves special scrutiny: the Eleventh Circuit has publicly excoriated plaintiffs' counsel, and threatened them with sanctions, for taking a position *with which the District Court agreed.* If this precedent is allowed to stand, then the zealous advocacy of all lawyers in all sorts of litigation will be chilled. Again, this is an area of law which needs uniformity; and it is an area in which the NBA feels strongly that the Eleventh Circuit has erred.

The third and fourth questions, in the NBA's view, are of major importance even though the answers are clear-cut. It

may well be necessary for this Court to reiterate the settled answers to these questions in the course of addressing the other questions presented in this case; the Eleventh Circuit's opinion appears to depart from those settled principles.

ARGUMENT

Each of the questions presented is of considerable importance to the administration of justice in federal courts, going well beyond the immediate context of this case. These are questions to which all members of the civil litigation bar—regardless of what clients they represent or what causes they pursue—need clear and uniform answers. And they are questions on which the lawful interests of all members of the bar, of the federal judiciary, and of the public would be better served by reversal of the Eleventh Circuit's decision.

1. As to Question 1, Vitally Important Questions are Presented Regarding the Scope of a District Court's Authority When Administering a Consent Decree.

Question 1 raises crucially important questions about the tools at a District Court's disposal when administering and overseeing an ongoing consent decree. The issue arises because the consent decree in this public employment discrimination case provided for a race-neutral competitive process for filling positions (*Reynolds v. ALDOT*, 996 F.Supp. 1130, 1132, 1136-37 (M.D. Ala. 1998)), and also provided for the adoption of a grievance procedure (*id.* at 1144 n.40). The District Court, in the order giving rise to Question 1, granted declaratory relief to the effect that the grievance procedure could not be used to fill positions outside of the mandated race-neutral competitive process. *Id.* at 1156. The reason—as grasped by the District Court, the plaintiff class, and also apparently the defendants, *id.* at 1137, 1138, 1155—was that without such a limit on the use of the

grievance procedure, a series of friendly grievance "settlements" could render the mandated competitive process a dead letter. *Id.* at 1139, 1141, 1151-52, 1154-55, 1156. In other words, the declaratory relief was issued because without it, the consent decree itself would become nugatory due to this unforeseen clever use (or abuse) of the grievance procedure.[2] The Eleventh Circuit reversed, holding that this was beyond the authority of the District Court. The Eleventh Circuit criticized the District Court's action as a forbidden act of "rewriting" a consent decree. *Reynolds v. Roberts*, 207 F.3d 1288, 1300-01 (11th Cir. 2000).

There are two potential ways of reading the proceedings below and the Eleventh Circuit's decision in this case. This potential ambiguity, however, does not counsel against certiorari; for on either possible reading, the Eleventh Circuit's decision creates a Circuit split on an important point of federal law.

Petitioners offer one reading of the case, and as they are of course more familiar with the record than is the NBA, the NBA must defer in large part to their reading. Petitioners do not, it seems, embrace the Eleventh Circuit's assertion that the District Court was "rewriting" the decree. Petitioners' view, instead, is that the District Court granted declaratory relief about the administration of the decree, pursuant to its authority under the decree. Under this view, an important Circuit split is presented as to whether courts overseeing consent decrees may issue such declaratory orders, or whether their powers are strictly limited to the issuance of contempt sanctions for violations of specific decree provisions. The NBA agrees that the Circuit split identified

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[2] The District Court was clear that it was *not* ruling that the availability or scope of the grievance procedure would depend on the race of the grievant. *Reynolds*, 996 F.Supp. at 1149. It is unclear why the Eleventh Circuit described the District Court as having done that (*Reynolds*, 207 F.3d at 1297 n.18); the District Court did not.

by the Petition on this issue is of vital importance, that it will recur frequently in major litigation of various sorts, and that it deserves this Court's scrutiny. The NBA, in order to avoid redundancy, will not repeat all that the Petitioners have said to prove the existence of the Circuit split on this point. This lack of redundancy should not be mistaken for disagreement.

But the NBA also points out, as *amicus curiae*, that an equally important but slightly different Circuit split is also fairly encompassed within the Petition, even on the other potential reading of the case—that is, even if one embraces the Eleventh Circuit's view that the District Court was actually "rewriting" the decree. *Reynolds*, 207 F.3d at 1300-01. "Rewriting", in this context, is simply a pejorative word for "modifying". So, the Eleventh Circuit's decision in this case (if it is read to include any discernible holding to govern future cases) on this reading means that District Courts cannot modify consent decrees—at least that they cannot do so where (as here) the so-called "modification" is an effort to ensure that the consent decree remains vital, that it is not manipulated into obsolescence or evaded, and that it does not contain the seeds of its own destruction. But other Circuits take a very different view, expressly allowing modification of consent decrees. *See, e.g., U.S. v. Western Electric*, 894 F.2d 430, 434 (D.C. Cir. 1990) ("There are normally two modes of decree administration available to a district court. The first is interpretation of a decree. . . . The second means of administering a consent decree is through modification. A district court may adjust the obligations of the parties . . .").

The Circuit split caused by the Eleventh Circuit is even a bit more pointed, because even after its decision in this case, that Circuit has reaffirmed the judicial authority to modify consent decrees, in the context of a *defendant's* request for a modification which would *reduce* its obligations under the decree. *See Florida Ass'n for Retarded Citizens v. Bush*,___F.3d___, 2001 U.S. App. LEXIS 5448, *6-*7 (11th

Cir. 2001). Therefore, unless the Eleventh Circuit's decision in this case is to be seen as a unique one containing no discernible holding to govern future cases (which is certainly an arguably correct view, but the possibility of this argument provides little comfort to any member of the bar), the rule in the Eleventh Circuit is now that District Courts can modify consent decrees *only* at *defendants'* urging in order to make decrees *weaker*, and that they cannot modify decrees at *plaintiffs'* urging in order to ensure that the decrees remain forceful in light of unforeseen or changing circumstances.

Such a double standard for decree modification, the NBA submits, is inconsistent with *Rufo v. Inmates of Suffolk County Jail*, 502 U.S. 367, 380-81 (1992), in which this Court held that

> [t]he upsurge in institutional reform litigation since *Brown v. Board of Education*, 347 U.S. 483 (1954), has made the ability of a district court to modify a decree in response to changed circumstances all the more important. . . . The experience of the District and Courts of Appeals in implementing and modifying such decrees has demonstrated that a flexible approach is often essential to achieving the goals of reform litigation.

See Supreme Court Rule 10(c) (listing, among situations in which certiorari is appropriate, those cases in which a court of appeals "has decided an important federal question in a way that conflicts with relevant decisions of this Court."). In addition, the Eleventh Circuit's double standard creates a stark split in the Circuits, because least two other Circuits have held—in this year alone—that District Court's modification power under *Rufo* is *not* limited to modifications which are sought by defendants or which make consent decrees weaker. *David C. v. Leavitt*,___F.3d___, 2001 U.S.App. LEXIS 3571, *12-*14 (10th Cir. 2001); *U.S. v. Secretary of HUD*, 239 F.3d 211, 216 n.5 (2d Cir. 2001) ("[M]odifications . . . that increase the obligations imposed by

a consent decree are also permissible. *See also United States v. Western Elec. Co.*, 310 U.S. App. D.C. 281, 46 F.3d 1198, 1202 (D.C. Cir. 1995) (noting that 'at the request of the party who sought the equitable relief, a court may tighten the decree in order to accomplish its intended result')"). *See* Supreme Court Rule 10(a) (certiorari warranted where "a United States court of appeals has entered a decision in conflict with the decision of another United States court of appeals on the same important matter").

This is truly an issue that needs to be addressed by this Court: whether a District Court can modify a consent decree *only* to *reduce* the decree's requirements, and *not* in order to keep the decree alive in light of experience or changed circumstances. This issue will arise frequently in some of the most important federal cases of our time, especially in civil rights cases, antitrust cases, and other categories of cases which frequently result in consent decrees. This case is a very good vehicle to address the issue, because the "modification" (such as it was) of the decree was a rather mild one. It can hardly even be said that it imposed any new obligation on anyone; instead, it merely placed a limitation on a grievance process which the decree itself had created, in order to avoid an internal conflict within the decree itself. In addition, the justification for the mild "modification" was overwhelming; unless "modified", the decree contained the unforeseen seed of its own destruction. The question of the scope of a District Court's authority in these matters, therefore, is presented in a pure and distilled form.

Among the many reasons to reject the Eleventh Circuit's rule, the NBA for now emphasizes only the following, as this reason also counsels in favor of a grant of certiorari: the Eleventh Circuit's rule would deter settlements in institutional reform cases and other major cases. If the reality of post-*Rufo* jurisprudence is the Eleventh Circuit's downward-ratchet effect—such that consent decrees can be

modified only in order to make them *weaker* but not to save them from obsolescence, evasion or manipulation—then plaintiffs will be well-advised to avoid consent decrees and to seek litigated decrees instead. In short, the Eleventh Circuit's rule makes consent decrees unattractive, and thus deters settlement of major cases. This in itself is a matter of enormous significance for the public, for the courts, and for government at all levels.

2. As to Question 2, the Eleventh Circuit's Decision Will Interfere Intolerably With the Duty of Zealous Advocacy Which All Lawyers Owe Their Clients.

Question 2 relates to the extent of the authority of the Court of Appeals, acting *sua sponte*, to declare the actions of plaintiffs' counsel to have been an "abuse of judicial process" warranting sanctions under 28 U.S.C. § 1927. The NBA submits that this is a vital question, made all the more important by the fact that the Court of Appeals has criticized and called for sanctions upon plaintiffs' counsel *for taking a position with which the District Court agreed.* The appellate court's call for sanctions for taking a winning position below, if not corrected by this Court, will upset the careful balance which has heretofore been struck between sanctioning frivolous arguments and fostering zealous advocacy. This is an issue which affects literally ever litigating attorney, and every party, in every federal case. It is "an important question of federal law that" to the NBA's knowledge "has not been, but should be, settled by this Court." Supreme Court Rule 10(c).

The Eleventh Circuit invoked 28 U.S.C. § 1927 with regard to the motion filed by plaintiffs' counsel seeking preliminary injunctive relief against the granting of certain specific promotions, pending resolution of the issue on a broader and more permanent basis. *Reynolds,* 207 F.3d at 1301-02

(invoking § 1927 as to this preliminary injunction, while declining to invoke it with regard to the later proceedings which gave rise to the declaratory order discussed in Section 1 of this Brief). That motion by plaintiffs was *granted* by the District Court (*see id*). The Eleventh Circuit vacated the preliminary injunction—and called the motion an abuse of the judicial process, *id.* at 1299—because (according to the Court of Appeals) no member of the plaintiff class stood to be injured by the challenged promotions. *Id.* But the District Court, in agreeing with plaintiffs' counsel that their motion was well-taken, had expressly concluded that there *was* injury to the plaintiff class from the denial of a fair opportunity to compete. *Reynolds*, 996 F.Supp. at 1152. Thus, the Court of Appeals has invoked § 1927 to sanction counsel for taking a position which the District Court had expressly agreed with.

Thus far, the law of sanctions has been carefully crafted in order to leave breathing room for zealous and even creative advocacy, such that a lawyer will feel comfortable making even a novel argument if some reasonable minds might accept it. That is, for instance, the very meaning of Rule 11's recognition that attorneys are free to argue for new law or the overruling of old law so long as the arguments are "non-frivolous". *See* Fed. R. Civ. P. 11(b)(2). The Rule's drafters explicitly warned that it "is not intended to chill an attorney's enthusiasm or creativity in pursuing factual or legal theories." Advisory Committee Notes, 1983 Amendment. More recent amendments have preserved this balance, noting that this aspect of Rule 11 is directed towards the prohibition of "patently frivolous" arguments, and counselling that a court considering sanctions for a legal argument should give due regard for the existence of support for the novel theory even in such out-of-the-way places as "minority opinions, law review articles, or . . . consultation with other attorneys." Advisory Committee Notes, 1993 Amendments. Under the Eleventh Circuit's approach that breathing room for zealous and creative advocacy no longer exists, at least not with the

certainty which is the sine qua non of real breathing room. Even if a reasonable mind *sitting on the U.S. District Court* accepts a lawyer's reasoned argument, in the Eleventh Circuit there is still the risk of sanctions.

The NBA also submits that one of the reasons not to allow the Courts of Appeals to sanction lawyers for the making of arguments which *prevail* in the District Courts, is that lawyers thus become innocent casualties in jurisprudential battles among judges. This case, it seems to the NBA, is an example of the phenomenon. The Eleventh Circuit's opinion, it must be candidly noted, takes a very hostile stance towards the District Court. This hostility is manifested not only in the Eleventh Circuit's language [3] but also in its actions.[4] The NBA firmly believes, based on a reading of the District

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[3] Consider, for instance, (a) the appellate court's assertion that the District Court was "intent on granting [plaintiff's] counsel the relief they sought" despite a putatively clear procedural bar, *Reynolds*, 207 F.3d at 1292 (where in fact, as shown in the Petition, the District Court's actions were well supported by authority and the District Court had no intent other than to do what it believed correct under the law and the facts); (b) the appellate court's assertion that the District Court "need[ed] to be reminded" of certain putative principles of law, *id.* at 1300, when (as again shown in the Petition) it is far from clear that those putative principles announced by the Eleventh Circuit are even correct; and (c) the appellate court's suggestion that the District Court reserved the grievance procedure for Black employees alone, when (as shown above) the District Court's opinion clearly shows that it did not do that. Sarcasm, and the completely baseless innuendo that the District Court had some agenda other than to decide the case on its merits, are throughout the Eleventh Circuit's opinion. The NBA believes that judges—like all members of the public—should refrain from such unwarranted attacks on the federal judiciary.

[4] Consider, for instance, the Eleventh Circuit's assignment of the sanctions matter to a different District Judge, *id.* at 1302, its direction that future instances of discrimination by the Respondents cannot be addressed in this litigation by this District Judge, *id.* at 1301, and its purported vacatur of a wide variety of District Court orders that were not before the appellate court, *id.*

Court's published opinion, that this hostility was inappropriate. Even where a Court of Appeals feels that reversal is appropriate, there is no need for gratuitous and factually incorrect jabs at an eminent District Court judge. And, returning to the second Question Presented, this sort of intra-judiciary hostility should not spill over into the sanctioning of lawyers for winning their cases.

The chilling effect on zealous advocacy arising from the Eleventh Circuit's decision will not be limited to plaintiffs' counsel in civil rights cases. It will affect every litigator for every client in every civil matter in federal courts. And it will, thereby, interfere with the development of the law, as counsel shy away from making even *compelling* arguments which would probably carry the day at the trial level, for fear that those arguments will be called "sanctionable" in hindsight by a court of appeals with a different view of the law. This is a matter on which this Court's voice is urgently needed, to correct the Eleventh Circuit's action which has upset the delicate balance in this area of law.

The NBA recognizes the potential for an argument that this case is not currently in the optimal posture for review on the issue of sanctions, as specific sanctions have not yet been imposed. However, the NBA emphasizes that the chilling effect of the Eleventh Circuit's decision on *all* advocates is so substantial as to justify review now. There is no jurisdictional impediment to review at this point; the decision of the Court of Appeals is clearly reviewable under 28 U.S.C. § 1254(1) even before a final quantification of sanctions. And it seems highly unlikely that the Eleventh Circuit will moot the sanctions matter by ultimately imposing no sanctions, as that Court has already declared that plaintiffs' counsel "abused the judicial process," and that "the abuse was as gross as any we have encountered." *Reynolds*, 207 F.3d at 1299. Accordingly, there is no reason to defer review.

3. Questions 3 and 4 Relate to Fundamentals of Federal Jurisprudence as to Which This Court May Be Required to Reiterate Some Basic Principles.

The third and fourth questions, in the NBA's view, are of substantial importance even though the answers are clear-cut. As to Question 3, it is already settled that the Courts of Appeals must accept District Court's findings of fact unless they are clearly erroneous. *See, e.g., Pullman-Standard v. Swint*, 456 U.S. 273 (1982). As to Question 4, it is already settled that the Courts of Appeals cannot indiscriminately overturn orders over which they have no jurisdiction. *See, e.g., Swint v. Chambers County Comm'n*, 514 U.S. 35 (1995). While the reiteration of basic principles such as these is presumably not a desired portion of this Court's caseload, it may well be necessary for this Court to reiterate those principles in the course of addressing the other questions presented in this case. The Eleventh Circuit's decision in this case seems to depart from these settled principles. As to findings of fact, *compare Reynolds*, 996 F.Supp. at 1152 (District Court finds that the challenged promotions would cause injury to Black plaintiff class members by denying them the opportunity to compete fairly for positions) *with Reynolds*, 207 F.3d at 1299 (Court of Appeals finds that the challenged promotions would not injure any class member, and does not mention District Court's contrary finding). As to appellate jurisdiction, *see Reynolds*, 207 F.3d at 1302 (purporting to erase many orders entered by the District Court over a multi-year span of ongoing litigation). Even if this Court would not normally grant certiorari to address these fundamental questions, in this case the NBA submits that certiorari is warranted because the Eleventh Circuit's departure from these settled rules was part of its unwarranted hostile stance towards the District Court (which has been discussed above). This is further justification for certiorari review. *See* Supreme Court Rule 10(a) (certiorari warranted

where a Court of Appeals has "so far departed from the accepted and usual course of judicial proceedings, . . . as to call for an exercise of this Court's supervisory power").

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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